

The Significance of the Notary and His Office in the Countries Associated in the Union Internationale du Notariat Latin

Introduction

The purpose of this article is to discuss briefly¹ the duties and functions of the notary practising in the countries associated in the Union Internationale du Notariat Latin² and to show the difference between these duties and functions and those of the notaries practising in England and Wales.

In the subsequent part of this article it will be shown that the scope of activities and duties of the continental notary is wider than the field covered by his namesake in England and Wales. Many of the activities which in England and Wales pertain to the province of the solicitor are performed on the Continent by the notary.

Definition of the Continental Notary

The definitions of the notary as laid down in the legislation of the countries associated in the Union show a large measure of similarity. These definitions include, in general, the following elements:

- (a) the notaries are public officials;

*Commission des Affaires Européennes de l'Union Internationale du Notariat Latin.

¹See for a detailed treatise more specifically dealing with France, L. Neville Brown, *The Office of the Notary in France*, THE INT'L & COMP. LAW Q., Vol. 2, January, 1953, pp. 60-71.

²These are in Europe, in alphabetical order: Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Spain and Switzerland. The position of the Portuguese notary is more dependent on the State than that of the notaries in the other countries mentioned above. In the western hemisphere are associated: (French) Canada, Louisiana and the Latin American states.

For the sake of brevity the notary practising in the above-named countries is hereafter referred to as the "continental notary," because the notariat dealt with here finds, in its present form, its origin on the continent of Europe; the "continental notary" includes also, of course, the notaries practising in the above-mentioned countries of the western hemisphere.

- (b) they have power to execute authentic deeds, usually in respect of declarations of will or intention, but occasionally also in respect of facts or events which are not classifiable as declarations of will or intention, e.g., in cases where their clients wish, or Statute prescribes, that such declaration of will or intention, fact or event shall be evidenced or established by an authentic deed;
- (c) they provide their deeds or instruments with a fixed date and they keep the originals of the deeds or instruments prepared by them in their custody and issue copies.

Public Officials

The notary is a public official. In all the countries associated in the Union he is appointed by an organ of the State, in some of these countries even by the Head of the State. He is not paid, however, by the State; the fees in respects of the services rendered by him are paid by his clients. He is wholly independent of everyone, including the State. His independence is evidenced by the fact that he is either appointed for life or for a period ending on the day on which he attains a determinate age. Consequently, he cannot be removed from office, except in case of misbehaviour or unfitness. The decision in this respect often lies with a Court.

A fixed scale of fees applies in respect of a large part of his services, these fees having been fixed by the State or by organizations of the notaries themselves. As regards the execution of authentic deeds the notary's activities are limited to the district for which he has been appointed, which district often coincides with the district of a court of law within whose jurisdiction he is practising. A notary may nevertheless render services to clients who are resident outside his district, provided always authentic deeds are executed by him within his district.

Before qualifying for appointment, a notary has to go through a profound schooling. In many countries a university training is required, and in countries where such is not the case, he has to go through an equivalent training. This training must be followed by a period of practical work. Before being appointed, the reliability of a notary is thoroughly investigated and whilst practising as a notary, he is generally also subject to a strict control, financially and otherwise.

Authenticity, Obligation to Keep Originals in Safe Custody, Issuance of Copies and Fair Copies

An authentic deed is a deed prepared by a public official, drafted in such form as is prescribed by Statute, such public official being in the first place the locally competent notary. A deed which presents itself as authentic is presumed authentic, unless the contrary is proved. An authentic deed

proves as against everyone the acts performed by the notary and the events which are mentioned as having taken place in this presence; as regards the statements or declarations made by the clients related or quoted in such deed it constitutes proof of the clients having made such statements or declarations, but not of the veracity of the declarations or statements so made; it goes without saying that, as against the clients or their successors-in-title, the benefit of such statements or declarations may be claimed.

Rebuttal by furnishing evidence disproving the authenticity of a deed or the veracity of the contents of an authentic deed often requires a special procedure. The facts proved by the authentic deed include the date of the deed itself, which will often be of great importance.

Important also is the fact that the notary must keep the originals of the deeds prepared by him or his predecessor in his custody (there are some exceptions to this rule, which are left undiscussed here). Such a deed remains for a considerable number of years in the custody of the notary himself or of his successors; thereafter they are removed for safekeeping to a State depository.

Also only the clients themselves can obtain copies. Furthermore, the so-termed "fair copies"—called "grosses" in French—are very important, being copies bearing a determinate superscription or heading (in France, for instance "Republique Française-Au nom du peuple français"), which enables the creditor to levy execution without his requiring for that purpose a judgment or an Order of any court of law. It stands to reason that the issuance of fair copies is surrounded by safeguards.

In the preceding paragraphs the powers and duties of the continental notary have been enumerated and described upon the basis of the usual statutory definitions. In this connection, however, regard should be had to the fact that, in a large number of cases the law prescribes that a determinate legal act shall be laid down and established in a notarial deed, upon penalty of nullity. Within the compass of this article it is not possible to give even an approximatively complete enumeration of these cases; moreover, the statutory regulations with regard to this point are not alike or even identical in all the countries associated in the Union. We confine ourselves to some examples of legal acts which, to be valid in law, in many countries associated in the Union, should be evidenced or established in a notarial deed, viz.:

- (a) creation of mortgages on real property and ships;
- (b) transfer of real property;
- (c) gifts;
- (d) marriage contracts;
- (e) various forms of last will and testament;

- (f) division and apportionments of a deceased's estate, in cases where persons of minor age are entitled to a share;
- (g) formation of limited liability companies.

The above summing-up is by no means exhaustive and can be extended by many, often very many, more examples for all countries associated in the Union.

With respect to the legal acts which have been enumerated above by way of example the notaries hold a monopoly, they being the only officials who by virtue of their office are entitled and empowered to provide the required authenticity. There are also cases of shared monopoly. For instance, many legislations provide that the bailiff as well as the notary are empowered to sell movable property by public auction, that the civil registrar and the notary are empowered to prepare deeds, whereby consent to entry into a marriage is given, etc.

The preceding paragraphs do not give a complete picture of the continental notary. He does not confine himself to writing down statements or declarations made by his clients. He is the legal adviser who gives form to the wishes expressed by his clients before they are laid down in a notarial deed. He must advise and guide his clients with respect to and in the particular departments of law, in regard to which his services are required. Such advice is not limited to those legal acts which should be evidenced or established by an authentic deed (which, as is shown by the foregoing, frequently occurs in connection with matters relating to the law of succession, marital property, immovable property and ships, and company law), but covers a much wider field. Upon the conclusion of agreements a notary, always protecting and guarding the interests of both parties, must take due care to see that the legally safest possible arrangement for both parties is attained or arrived at; he will state his opinion as regards the proper set-up or arrangement of limited liability companies and other legal entities and enterprises, and upon questions relating to or touching their foundation or formation; he is adviser in a number of important tax matters (succession duty, registration fees, turnover tax to the extent that the same relates to real property and stamp duty). He also discusses with specialists in the field of other taxes, taxation problems, such as income tax, property tax and company tax.

Finally, he will also be in a position to advise on legal acts that do not require to be evidenced or established by a notarial deed.

Consequently, the continental notary's scope of operations is wide, his position being in many respects similar to that of the solicitor in England and Wales. On the other hand, he does not as such play a part in the preparation and conduct of legal proceedings, nor in pleading the Litigant's

case in a court of law, this being due to the structure of the legal professions in the countries where the continental notary practises, the last-mentioned task being performed in those countries by the "sister-profession," indicated here by the general term "avocat." In several countries a notary can at the same time be an "avocat," but this does not fundamentally affect the division of tasks between the two professions.

The difference between the position of the notary in England and Wales and the continental notary is due to historical causes, which fall outside the compass of this article. There are no grounds for expressing a preference for either of the two systems. Both systems have proved satisfactory. The different ways in which the notaries in England and Wales and the continental notaries have developed still create—and frequently—misunderstandings in Anglo-Saxon countries as regards the position of the continental notary. It has been the intention of this article to help clarify this misunderstanding.